IN THE

Supreme Court of the United States

OCTOBER TERM 1987

(3)

No. 87-2123

DEPARTMENT OF AGRICULTURE
AND CONSUMER SERVICES,
an agency of the State of Florida,
Petitioner,

v.

MID-FLORIDA GROWERS, INC. and
HIMROD & HIMROD CITRUS NURSERY,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI AND APPENDIX

M. STEPHEN TURNER
DAVID K. MILLER*
BROAD and CASSEL
820 East Park Avenue
P. O. Drawer 11300
Tallahassee, Florida 32302
904/681-6810

BRUCE S. ROGOW
Nova University Law Center
3100 S.W. 9th Avenue
Fort Lauderdale, Florida 33315
305/524-2465

*Counsel of Record

QUESTION PRESENTED

The Petition misstates the question presented. We restate the question, presenting reasons for the clarification and reserving the jurisdictional arguments below.

Is there a taking of private property for which compensation must be paid when the State, acting under its police power to promote state economic interests, unilaterally declares an emergency and destroys valuable citrus trees which were healthy and harmless, and when no imminent danger actually existed to warrant destruction?

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STATEMENT OF THE CASE

The Florida Department of Agriculture and Consumer Services (the "Department") seeks certiorari to review a decision of the Florida Supreme Court that required it to compensate owners of healthy citrus trees which had been destroyed by the state's canker eradication program. Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc., et al., 521 So.2d 101 (Fla. 1988) (Petition Appendix A-6). The Florida Supreme Court affirmed a Florida District Court of Appeal decision which, in turn, had affirmed a state trial court's decision that the destroyed trees were healthy and that their taking required compensation. State of Florida, Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc., et al., 505 So. 2d 592 (Fla. 2d DCA 1987) (Petition Appendix A-10).

The Florida Supreme Court found that compensation was required because the destruction of the healthy trees was not ultimately a disease control measure to prevent public harm, but a measure to maintain public confidence in the state citrus industry where a bacterial disease was suspected,

but never actually present at Respondents' nurseries. The Court held:

> The Department contends that no taking occurred in the instant case because the trees were destroyed in order to prevent a public harm. We, however, agree with the district court's conclusion that destruction of the healthy trees benefitted the entire citrus industry and, in turn, Florida's economy, thereby conferring a public benefit rather than preventing a public harm. . . . Although this factor alone may not be conclusive, we have previously recognized that if a regulation creates a public benefit it is more likely that there is a taking. See Graham v. Estuary Properties, Inc., 399 So.2d 1374, 1381 (Fla.), cert. denied sub nom. Taylor v Graham, 454 U.S. 1083, 102 S.Ct. 640, 70 L.Ed.2d 618 (1981). . . . A taking of private property for a public purpose which requires compensation may consist of an entirely negative act, such as destruction. See, e.g., Corneal v. State Plant Board, 95 So.2d 1 (Fla. 1957) (destruction of healthy citrus trees required compensation).
>
> Petition Appendix A-3.

The Department attempts to squeeze an important federal question from that decision. The Petition's long discussion of the "facts," (Petition at 7-14) including references to the United States Department of Agriculture[1]

1The Petition mentions the role of the United States Department of Agriculture (USDA) in helping to fund canker eradication measures and adopting

and to other pending suits,[2] is irrelevant. The Florida Supreme Court's opinion alone is the focal point for certiorari. As we demonstrate below, that opinion, and subsequent state court proceedings based solely on state constitutional grounds, present no conflict of authorities on important federal questions, and warrant no review by this Court.

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rules regulating interstate movement of citrus products. (Petition at 11-13, 18). These observations form no part of the record or the issues presented in the Florida courts. Even if properly raised below, however, the USDA's role would not create a federal issue since no challenge to its powers or duties is presented, and no relief of any kind is or could be sought against USDA in state court.

[2]The Department's potential liability in other cases likewise forms no part of the record or issues presented here. If the Department's precipitous destruction of healthy and harmless citrus plants inflected losses of this magnitude on Florida businesses, destroying investments and employment, and these businesses remain uncompensated after four years, then the Department's concern should naturally lie with the victims of this action. As the Florida Supreme Court observed in oral argument, whatever liability is established is likely to be borne by the state citrus industry as a whole in the form of an additional tax. Is it possible that the impetus for this Petition comes from powerful interests in the state citrus industry, who benefited economically from the eradication program but do not want to share the resulting economic burden?

SUMMARY OF ARGUMENT

Certiorari should be denied because:

1. This case presents no case or controversy for this Court. The trial on the issue of compensation due has already taken place in the state trial court, and the amount of compensation has been determined there under state law alone. Whatever review this Court may make cannot affect the parties' rights as determined in this case under state law.

2. The decision below rests upon adequate and independent state grounds. The Florida Supreme Court cited primarily to state court decisions, and to the state constitution, as freestanding authority for its holding. Other proceedings in the record, as well as reference to Florida law on condemnation generally, support the proposition that state law supplied the rule of decision here.

3. The decision below is not inconsistent with other decisions on the taking issue. The burning of Respondents' healthy citrus trees was not undertaken to control disease, because there was no showing that they were diseased or even that they were exposed to disease and presented imminent danger. The purpose of the burning was

to restore public confidence in the state citrus industry. The physical destruction of valuable property for such a purpose presents a clear case for compensation, and does not merit review.

Each of these reasons is sufficient in itself to justify denial of the writ.

ARGUMENT IN OPPOSITION TO WRIT

I. The Decision Below Presents no Case or Controversy for This Court

The Petition for Writ of Certiorari should be denied because this case is moot for purposes of review by this Court.

On January 21, 1988 the Florida Supreme Court rendered its opinion that the Department is required to pay full and just compensation to these Respondents. Petition Appendix A-6. The Florida Supreme Court did not stay its decision, however, but permitted the trial on compensation to proceed. On March 22 and 23, 1988, the trial to determine the amount of compensation, based solely on the Florida Constitution, was held in the state trial court. On April 1, 1988, the Florida Supreme Court denied rehearing. Petition Appendix A-9. On April 26, 1988, the trial court entered its judgment in the amount of $1,943,458.00. See Respondents' Appendix A- 26. The Department has appealed that judgment to the District Court of Appeal.

The Department has acknowledged the existence of these proceedings:

> In March of 1988, a Pre-Trial Order was entered [in the state trial court] which provided that Petitioner was obligated as a matter of law to pay full and just compensation to Respondents for their losses in accordance with the Constitution of the State of Florida. As a result, at the trial for damages held in March 1988, the damages issue was tried without reference to the Fifth Amendment and the Jury Instructions were based exclusively on the Florida Constitution.
>
> Petition at 5.[3]

Consequently any decision by this Court would not affect the rights of the Department and Respondents in this case. The Respondents have already prevailed at trial on non-federal grounds. If this Court granted certiorari and reversed the Florida Supreme Court ruling, the Respondents' state constitutional damage judgment would still stand.

Article III, Section 2 of the United States Constitution requires a case or controversy. "[F]ederal

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[3] The Pretrial Order contained the following statement which was read to the jury:

> The State of Florida, Department of Agriculture and Consumer Services is therefore obligated, as a matter of law, to pay full and just compensation to the Plaintiffs for their losses in accordance with the Constitution of the State of Florida. This determination. . . may not be questioned in this proceeding.

Respondents' Appendix A- 23.

courts are without power to decide questions that cannot affect the rights of litigants in the case before them." North Carolina v. Rice, 404 U.S. 244, 246 (1971); DeFunis v. Odegaard, 416 U.S. 312, 316 (1974).

In DeFunis the Court declined to decide the merits because "without regard to the ultimate resolution of the issues in this case, DeFunis will remain a student in the Law School. . . ." 416 U.S. at 316-17. Here, without regard to the ultimate resolution of the issues presented by the Department, the Respondents' right to compensation has already been decided solely upon state law and state law will remain the applicable standard in the dispute in all further proceedings.

The Department apparently recognizes the case it is presenting here is moot. It concedes "no federal issue was raised in the subsequent trial on damages." Petition at 6. Nevertheless, it asks this Court to grant certiorari based upon the fact that the "Department is already defending eleven citrus canker cases," and it may have substantial liability "to these plaintiffs and other potential plaintiffs.. . ." Petition at 6.

Respondents have already established and won their claim under the state constitution. If the Department raises and preserves federal questions in its other cases, perhaps one of them may present an actual case or controversy for this Court's consideration. This case does not meet the requirements of Article III, Section 2.

II. The Decision Below Rests Upon An Adequate and Independent State Ground

The certified question before the Florida Supreme Court was whether the state could "destroy healthy but suspect citrus plants without compensation." The Court said no, relying on two state cases:

> [C]onsistent with our decisions in State Plant Board andCorneal, we answer the certified question in the negative.
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> Petition Appendix A-5.

This passage refers to State Plant Board v. Smith, 110 So.2d 401 (Fla. 1959), and Corneal v. State Plant Board, 95 So.2d 2 (Fla. 1957). These cases held that compensation is due the owner when the State destroys healthy citrus trees that do not present any imminent danger,

for the purpose of protecting other trees of the same species. Both Smith and Corneal expressly construed the predecessor of current Article X, Section 6, Florida Constitution, which guarantees "full compensation" for private property taken. Smith, passim; Corneal,95 So.2d at 4.

The Court observed that Smith was "a case involving circumstances similar to the present case." Petition Appendix A-4. The Court rejected the Department's attempt to distinguish Smith, noting:

> Because Article X, Section 6, Fla. Const. is self-executing, it is immaterial that there is no statute specifically authorizing recovery for loss.
>
> Petition Appendix A-4.

This citation to the Florida Constitution confirms that an adequate and independent state constitutional basis exists for the decision.

The Florida Supreme Court's opinion does cite to four federal cases, in addition to nine state cases. None of the federal cases is cited as freestanding authority for any holding. Each federal citation serves an explanatory, as opposed to expositive, purpose in the opinion. The presence

of such citations does not establish that federal law was dispositive.[4]

In Michigan v. Long, 463 U.S. 1032 (1983), this Court held that when a state court decision fairly appears, on its face, to rest primarily on federal law or to be interwoven with federal law, and there is no "plain statement" enunciating adequate and independent state grounds, this Court may assume, as the most reasonable explanation, that the decision was based on federal grounds. In Michigan v. Long, this Court's assumption that no independent state law ground existed was based on the face of the state court's opinion. It noted that the state court's only reference to state law cited state and federal constitutional provisions together.

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[4]The absence of controlling federal issues is reflected in other portions of the record in the Florida courts. The Respondents' Second Amended Complaint (Respondents' Appendix A-1) the Department's Answer (A-7), the Pretrial Stipulation (A-10), and the certified question considered by the Florida appellate courts all discuss compensation with out reference to federal grounds. This Court has held that a demand for compensation which does not specify federal or state grounds is not deemed to raise a federal issue. Consolidated Turnpike Co. v. Norfolk & O. V. Ry. Co.,228 U.S. 326 (1913).

Moreover, Respondents requested attorney's fees in the Florida courts based solely on state law grounds (A -115). The Florida Supreme Court's order granting attorney's fees, Petition Appendix A-9, could only have been based on a determination of liability for taking under state law.

Finally, as noted above the trial court's Pretrial Order relies solely on the Florida Constitution as the basis for awarding compensation (A -23) , as did the entire trial proceeding.

Id. at 1037. It noted that the state courts relied exclusively on federal cases (such as Terry v. Ohio) and did not cite a single state case. Id. at 1043. It noted that the state court declared that the lower state court's decision was based on a misapplication of Terry v. Ohio principles. Id. at 1044.

No such features appear in the instant opinion of the Florida Supreme Court. On the contrary, state court decisions and the state constitution are cited as freestanding authority for the holding. This decision does not appear on its face to rest primarily on federal law or to be interwoven with federal law, and thus affords no grounds for the assumption that it is based on federal law.[5]

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[5]An evaluation of the context of state law also reveals that Florida law provides greater protection to property owners than the United States Constitution requires. Compare the Fifth Amendment ("just compensation") with Article X, Section 6, Florida Constitution ("full compensation"). See Sheppard, Compensation in Florida Condemnation Proceedings, 14 U.Fla.L.Rev. 28, 29 (1961) (citing to dissenting opinion comparing "just" and "full" compensation standards in Central Hanover Bank and Trust Co. v. Pan American Airways, 137 Fla. 808, 824, 188 So. 820, 826 (1939)). Florida practitioners consider state law to be more favorable to the property owner in condemnation actions than federal law. See Weiner, "Distinctions Between Florida and Federal Practice," Florida Eminent Domain Practice and Procedures (Fla. Bar 4th Ed. 1988). In this jurisprudential context, it is commonplace for condemnees to seek redress in state courts under state law, but highly irregular that a state agency condemnor would seek refuge under federal law. There is no requirement, of course, that reduces State property rights guarantees to the minimum standard requird by the United States Constitution. Brennnan, State Constitutions and the Protection of Individual Rights, 90 Harv. L.Rev. 489 (1977).

The permissible assumption under Michigan v. Long does not displace the petitioner's normal burden to demonstrate the basis for jurisdiction. Id., n. 8 at 1042. In this case, no jurisdiction is shown, either because any possible federal issue is moot, or because there is an adequate and independent state ground.[6]

III. The Decision Below is Not Inconsistent with Federal and Other State Decisions and Merits No Review

The Florida Supreme Court's decision is not inconsistent with decisions of other courts on similar issues, and presents no special occasion for the exercise of discretionary review. The Department's assertions about the

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[6]The Petition argues that the Florida Supreme Court's decision determining liability is final for review purposes, contrary to Grays Harbor Co. v Coats-Fordney Co., 243 U.S. 251 (1917). Modern decisions construing the finality requirement have preserved the Grays Harbor rule. See Cox Broadcasting Co. v. Cohn, 420 U.S. 469, n.6 at 477-78 (1975); San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 633 (1981). Adherence to precedent would require that certiorari be denied on this basis as well.

The Department's discussion of the finality issue relies on Cox Broadcasting. Unlike Cox Broadcasting, however, this case does not involve a potential future trial that might foreclose important federal issues from review. That trial has already taken place here, and the only appellate review available now is on state law grounds that governed the final judgment of the trial court. If a dispositive federal issue had existed, the opportunity to present it for review in this Court has passed.

novelty, importance and inconsistency of this decision are based entirely on mischaracterizations of the issues presented. It is necessary at this point to clarify and supplement the Department's discussion of the factual background.

The Department's diagnosis of citrus disease at Ward's Nursery in August 1984 was based on inadequate information and false assumptions about the nature of the disease found. The disease found was not the virulent "A" strain canker originally suspected, but a mild strain called "nursery" or "E" strain canker that posed no threat to the citrus industry. The undisputed expert testmony at the trial on liability established this fact. The Department's witnesses acknowledged that they did not know what disease had been found. They simply assumed that it was the virulent "A" strain.[7]

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[7]The United States Department of Agriculture recently confirmed that the "nursery" strain found at Ward's Nursery posed no danger to the industry. The report found:

> There is insufficient evidence to support the contention that even the most virulent strains (also referred to as aggressive strains), are a serious threat to citrus production in Florida.

* * *

The Department followed its assumption that the disease was dangerous with a unilateral declaration of emergency and peremptory destruction of citrus trees. The Department rejected less drastic alternatives, such as quarantine and spraying. Under Florida law, the owners of the condemned property had no opportunity to contest the factual basis for the emergency administrative "Immediate Final Orders," or to establish the healthiness of the condemned treees until this inverse condemnation proceeding.[8]

Respondents' trees were never infected or infested with, or even exposed to, citrus canker of any kind, not even the "nursery" strain found at Ward's Nursery. They were

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No positive evidence exists to suggest that the Xanthomonas nursery strains pose a threat of significant losses or reduction in quality to bearing citrus in groves. Thus, it is not clear to us that any control will be required.

Report of the Scientific Review Panel -- Citrus Canker Nurser Strains at 2, 3 (U.S.D.A., May 11, 1988).

The report found that even the "A" or "Asiatic" strain can be controlled by spraying, cultural practices, and sanitation. Id. at 4.

[8]See State Plant Board v. Smith, above, and Conner v. Carlton, 223 So.2d 324 (Fla. 1969). In the instant case, the Department began burning Respondents' citrus plants on October 7, 1984, and did not issue its "Immediate Final Orders" until the burning was nearly complete, on October 16, 1984. Petition Appendix A 44-51. The orders make no findings concerning the incidence of canker at Respondents' nurseries.

healthy and valuable plants posing no threat to other plants.

The Department burned Respondents' plants pursuant to the eradication program only because they had purchased budwood from Ward's Nursery some four months before any infection there. The Courts below did not find that the burning was a disease control measure to protect public health and safety, but rather that it was perceived necessary to promote or protect the industry's economic interests.[9] The trial court held that "A police power circumstance existed to protect the economic public welfare. . . ." Petition Appendix A-17. The Second District Court of Appeal quoted this finding with approval, and held that:

> Destruction of the healthy trees, however, assured the continued vitality of Florida's most valuable citrus industry. Because destruction of the healthy trees benefited the entire citrus industry and, in turn, Florida's economy, the cost is more properly spread among the many rather than the few who were unfortunate enough to have purchased budsticks from the infected nursery.

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9 The state courts have upheld police power measures undertaken topromote the economic interests of the state citrus industry. See Coca-Cola v. State Dept. of Citrus, 406 So.2d 1079 (Fla. 1982), app. dismissed sub nom Kraft Inc. v. Florida Dept. of Citrus, 456 U.S. 1002 (1982). That was the purpose of the eradication program as applied in this case.

Petition Appendix A-16.

The Florida Supreme Court also upheld the trial court's findings, and quoted this conclusion of the District Court of Appeal with approval. Petition Appendix A-3, A-6.

The authorities cited by the Department for conflict do not concern the destruction of healthy plants for economic benefit to the industry. Once that factual situation is understood, the alleged inconsistencies vanish.

The Florida Supreme Court's reasoning is not inconsistent with that used by this Court in taking cases. First, it considered the nature of the Department's action, especially the physical invasion of the property. A physical invasion deprives the owner of all use and benefit of the property, and impairs the ability to dispose of the property. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 417 (1982). The physical destruction of personal property has the same effect as the physical invasion of real property.

A second factor is the governmental purpose or justification for implementing the regulation in question. This factor was emphasized in Keystone Bituminous Coal

Ass'n v. DeBenedictus, _____ U.S. _____, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987). There is no question that where government takes property that is inherently harmful or dangerous -- such as diseased plants or livestock, adulterated drugs, contraband weapons or mining rights that by their exercise would endanger the community -- it addresses a nuisance and prevents grave public harm. In Keystone Bituminous Coal Ass'n, there was no serious question that the prohibitive regulation was necessary to prevent land subsidence and related dangers. There no compensation is required. On the other hand, when the government takes property that is harmless in itself and poses no public danger, compensation is required. The instant case, involving the burning of healthy and harmless citrus plants to maintain public confidence in state citrus products, clearly falls in the latter category for which compensation is required.

The third factor cited by this Court is the extent to which regulation interferes with investment-backed expectations. This factor was discussed in both Loretto and Keystone Bituminous Coal Ass'n. Keystone Bituminous

Coal Ass'n concerned a prohibitive regulation that, on the record presented, did not significantly diminish property value or profitable operations thereon. Id., 94 L.Ed.2d at 488, 493. This case concerns a confiscation that destroyed the entire value of the property. Here the nursery owners had every right to expect that their investments would bear fruit. The Department's total destruction of the healthy trees clearly interfered with Respondents' legitimate investment-backed expectations, and justified an award of compensation. The award of compensation would be due under either federal or state constitutional law.

Miller v. Schoene, 276 U.S. 272 (1927), is the only decision from this Court cited by Petitioner that concerns taking of plants. In Miller, this Court held no compensation was required under the United States Constitution when the state felled cedar trees infected with a fungus dangerous to apple trees. Miller is inapplicable for several reasons. First, the cedar trees were felled, not burned as in this case, so their entire value was not destroyed. This distinction was recognized in Keystone Bituminous Coal Ass'n, above, 94 L.Ed.2d at 506 (dissent of four justices). Second, the cedar

trees were actually infected and dangerous, whereas the citrus plants here were healthy and harmless. Third, the cedar wood had little economic value compared to the apple trees that were saved, so the owner's investment-backed expectations were not substantially impaired. In the instant case, the healthy citrus stock had substantial value, and was destroyed only to prevent perceived danger to other citrus stock. Miller is distinguishable from this case on each of the three Loretto-Keystone tests.

Finally, the Department cites two lower federal court decisions and numerous decisions of other state courts that it claims conflict with the instant decision. These decisions fall into two categories. There are decisions that authorize destruction of diseased or dangerous plants or livestock -- a situation not applicable here. There are also decisions that uphold quarantines of suspect plants, where full value is not destroyed. Florida law recognizes that such reasonable quarantines do not constitute takings See Flake v. State, 383 So.2d 285 (Fla 5th DCA 1980). Had the cases cited by the Department considered destruction of healthy crops, they could reasonably have reached a different result. See, e.g.,

Colvill v. Fox, 149 P. 496, 499 (Mont.1915) (if owner's apples destroyed by state fruit pest inspector were not affected with apple scab, his right to recover "could not be questioned.")

The determination of whether a police power exercise results in a taking involves an ad hoc factual inquiry. Loretto, above at 426. The District Court of Appeal cited this principle once, Petition Appendix A-12, and the Florida Supreme Court cited it twice. Petition Appendix A-2, A-5. The decision is clearly not an unruly precedent impairing a wide range of state police powers, as the Department contends, but is expressly limited to the unique factual record carefully summarized in the opinions. In short, the decision furnishes no basis for generalized concern among state regulatory authorities.

The key point is that the Department inflicted irreversible damage on healthy and harmless citrus stock, destroying all use or benefit therein, in order restore public confidence in Florida citrus products, for the benefit of the entire citrus industry. The Florida Supreme Court's decision allows the state to undertake such measures on an emergency

basis where perceived necessary, but spreads the burden of loss to the whole economy where such measures overshoot their mark by destroying valuable property that poses no danger. This is a fair, sensible and standard application of the compensation requirement. Nothing in the decision merits this Court's review.

CONCLUSION

Respondents pray that the Court will deny the petition for writ of certiorari.

M. Stephen Turner
David K. Miller
(Counsel of Record)
BROAD andCASSEL
P. O. Drawer 11300
820 E. Park Avenue
Tallahassee, FL 32302
904/681-6810

and

Bruce S. Rogow
Nova University Law Center
3100 S.W. 9th Avenue
Ft. Lauderdale, FL 33315
305/524-2465

INDEX TO APPENDIX

IN THE CIRCUIT COURT OF
TENTH JUDICIAL CIRCUIT
IN AND FOR HARDEE COUNTY
FLORIDA

MID-FLORIDA GROWERS, INC., and
HIMROD & HIMROD CITRUS NURSERY,
a Partnership composed of Joe Himrod
and Joe B. Himrod,

Plaintiffs,

vs. CASE NO. G-85-275

STATE OF FLORIDA, DEPARTMENT OF
AGRICULTURE AND CONSUMER SERVICES,

Defendants.

SECOND AMENDED COMPLAINT

Plaintiffs, Mid-Florida Growers, Inc. ("Mid-Florida") and Himrod & Himrod Citrus Nursery ("Himrod & Himrod"), sue the State of Florida, Department of Agriculture and Consumer Services ("Department"), an agency of the State of Florida, and allege:

1. This is an action for money damages exceeding $5,000.00 for unconstitutional taking of Plaintiffs' property without just compensation.

2. Mid-Florida is a Florida corporation, doing business as a nursery located in Hardee County, Florida.

3. Himrod & Himrod Citrus Nursery is a partnership composed of Joe Himrod and Joe B. Himrod, doing business as a nursery located in Hardee County, Florida.

4. The Department is an agency of the State of Florida responsible for enforcing state laws relating to agriculture pursuant to Chapters 570 and 581, Florida Statutes.

5. In April of 1984, Mid-Florida and Himrod & Himrod received citrus budwood from, or propagated from, Ward's Nursery, a citrus nursery located in Polk County, Florida.

6. On August 27, 1984, citrus canker (Xanthomonas campestris pv. citri) was detected in Ward's Nursery.

7. Citrus canker is a bacterial disease causing damage to leaves, shoots, and fruit of susceptible plants in the Rutaceae (citrus) family.

8. Because the records of Ward's Nursery revealed that Mid-Florida and Himrod & Himrod had obtained budwood from Ward's Nursery, Department inspectors on September 6, 1984, obtained samples of the citrus trees from Mid-Florida and Himrod & Himrod to test whether their trees were infected with the citrus canker.

9. On September 10, 1984, the Department informed that the tests conducted on trees from Mid-Florida and Himrod & Himrod's nurseries were "negative," meaning that their trees were not infested with, or carriers of, citrus canker.

10. Despite this finding, the Department advised Plaintiff on October 2, 1984, that their citrus trees and budwood must be burned and that a quarantine of their nurseries was not an acceptable alternative.

11. The Department advised Plaintiffs, however, that they would be paid full and just compensation for the destruction of their trees, and Plaintiffs thereupon cooperated with the Department in scheduling their trees for burning.

12. From Monday, October 7, 1984, until Wednesday, October 17, 1984, the Department destroyed by burning 137,880 of Mid-Florida's and 143,594 of Himrod & Himrod's citrus trees and budwood.

13.On October 16, 1984, the Department entered a confirmatory order that designated the nurseries of Mid-Florida and Himrod & Himrod as eradication or treatment areas pursuant to Emergency Rules 5BER84-8 and 5BER84-9 and directed that their budwoods received from Ward's Nursery and all their citrus trees within 125 feet be immediately destroyed by burning or other approved method.

14. Despite statements by Department officials, including the Commissioner of Agriculture, that citrus tree owners would be paid full and fair compensation for their destroyed trees, Plaintiffs were paid, under reservation of rights, only 30% to 60% of their actual invested dollars, which was 30% to 40% of the market value of their destroyed trees. This amount was substantially less than full and fair compensation for the property destroyed.

16. Pursuant to its regulatory power to take reasonable measures to protect the citrus industry in Florida as a whole, the Department could order the immediate destruction of Plaintiffs' non-infected citrus trees and budwood because a small number of budwood were bought from a nursery that had some infected stock.

17. Nevertheless, in destroying such trees and budwood that were not infected by, or carriers of, citrus canker or other disease, the Department thereby took Plaintiffs' property for a public use or purpose, and was obligated to pay just compensation to Plaintiffs.

18. The Department inversely condemned Plaintiffs' property by ordering the destruction thereof without paying full and fair compensation.

19. Plaintiffs are entitled to recover damages for the unconstitutional taking of their property in the amount of the uncompensated value thereof, plus interest.

20. Plaintiffs have retained counsel to represent them in these proceedings and are also entitled to recover reasonable attorneys' fees.

Wherefore, Plaintiffs pray for entry of Judgment against Defendant for compensatory damages, attorneys' fees and costs. Plaintiffs demand trial by jury.

Dated this 10th day of October, 1985.

CULPEPPER, PELHAM, TURNER
& MANNHEIMER
300 East Park Avenue
Post Office Drawer 11300
Tallahassee, Florida 32302
904/681-6810

By: /s/ M. Stephen Turner
M. Stephen Turner

And

/s/ William L. Hyde
William L. Hyde

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Robert A. Chastain, General Counsel, Florida Department of Agriculture and Consumer Services, Room 515, May Building, Tallahassee, Florida 32301; by U.S. Mail this 10th day of October, 1985.

/s/ M. Stephen Turner

IN THE CIRCUIT COURT,
TENTH JUDICIAL CIRCUIT,
HARDEE COUNTY, FLORIDA

MID-FLORIDA GROWERS, INC. and
HIMROD & HIMROD CITRUS NURSERY,
a Partnership composed of
Joe Himrod and Joe B. Himrod,

Plaintiffs,

vs. Case No. CA-G-85-275

STATE OF FLORIDA, DEPARTMENT OF
AGRICULTURE AND CONSUMER
SERVICES,

Defendant.

_____/

ANSWER

Defendant, State of Florida, Department of Agriculture and Consumer Services answers the Second Amended Complaint and says:

1. Defendant admits the averments contained in paragrahs 1, 2, 3, 4, 5, 6, 7, 8, 10, 12, 13 and 16.

2. Defendant denies the averments contained in paragraphs 11, 17, 18 and 19.

3. Answering paragraph 20, defendant is without knowledge as to whether or not plaintiffs have

retained counsel to represent them in these proceedings, but denies that plaintiffs are entitled to recover attorneys' fees.

4. Answering paragraph 9, defendant admits that it informed plaintiffs that the tests conducted on the trees from the nurseries were "negative," but denies telling plaintiffs that their trees were not infested with, or carriers of, citrus canker.

5. Answering paragraph 14, defendant denies that its Commissioner or any other officials made statements that citrus tree owners would be full and fair compensation for their destroyed trees. Defendant admits that plaintiffs received financial assistance, but is without knowledge as to the further averments in that paragraph.

6. Defendant is unable to locate within the bounds of the Second Amended Complaint a paragraph number 15, and therefore, does not at this time respond to such a paragraph.

/s/ ROBERT A. CHASTAIN
ROBERT A. CHASTAIN
General Counsel
Florida Department of Agriculture
and Consumer Services
Room 515, Mayo Building
Tallahassee, Florida 32301
Phone: 904/488-6853

Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to M. Stephen Turner, Esquire and William L. Hyde, Esquire, attorneys for plaintiffs, by mail this 3rd day of January, 1986.

Frank A. Graham, Jr.
Attorney

IN THE CIRCUIT COURT FOR THE TENTH JUDICIAL CIRCUIT, IN AND FOR HARDEE COUNTY, FLORIDA

MID-FLORIDA GROWERS, INC., and HIMROD & HIMROD CITRUS NURSERY, a Partnership composed of Joe Himrod and Joe B. Himrod,

Plaintiffs,

vs. Case No. CA-G-85-275

STATE OF FLORIDA, DEPARTMENT OF AGRICULTURAL AND CONSUMER SERVICES,

Defendant.

PRETRIAL STIPULATION

Plaintiffs and Defendants, pursuant to Order for Pretrial Conference dated June 17, 1986, hereby stipulate and agree as follows with regard to the non-jury trial scheduled for September 24, 1986.

(a) Pleadings on which case will go to trial: Plaintiffs' Second Amended Complaint dated October 10, 1985 (deemed filed by Order of December 20, 1985), and Defendant's Answer to Second Amended Complaint dated January 3, 1986.

(b) Concise statement of action: Inverse condemnation suit with request for jury trial to determine just compensation if Court finds that taking occurred. Plaintiffs contend that the Defendant State Agency destroyed by burning their nursery stock which was not infected or diseased, thereby resulting in a taking for public purpose. Defendant contends that the destruction occurred pursuant to regulatory and police power and therefore cannot constitute a taking.

(c) Admitted facts: Action is for damages exceeding $5,000. Plaintiffs do business in Hardee County. Defendant is charged to enforce state agriculture laws. In April 1984, Plaintiffs received citrus budwood from Ward's Nursery in Polk County. On August 27, 1984, a form of citrus canker was detected at Ward's Nursery. Citrus canker is a bacterial disease that can cause damage to certain citrus plants. Defendant obtained samples from Plaintiffs' Nursery on September 6, 1984, to determine whether their stock was infected. On September 10, 1984, Defendant informed Plaintiff the tests were negative, that is, did not establish that any of their stock was infected by or infested with citrus

canker. However, on October 2, 1984, Defendant advised Plaintiffs that their nursery stock must be burned and that quarantine was not an acceptable alternative. From October 7, to October 19, 1984, Defendant burned some 137,880 of Plaintiff Mid-Florida's and 143,594 of Plaintiff Himrod's trees and budwood. On October 16, 1984, Defendant entered a emergency confirmatory order designating Plaintiffs' Nurseries as eradication areas and directing destruction of Plaintiffs' stock within 125 feet of budwoods from Ward's Nursery.

Disputed facts to be litigated: Whether Defendant assured that Plaintiffs would be fully compensated upon cooperation in scheduling their stock for burning, and whether under the circumstances present, the burning was a taking of property for which full and just compensation is due.

(d) Legal issue for court determination: Whether eminent domain power was exercised and just compensation is due in the circumstances of this case, or whether there was a proper exercise of the police power that would not require full compensation. Defendant also contends that Plaintiffs'

release of liability resolved all claims for compensation. Plaintiffs do not agree this is an issue in the case. All parties stipulate and agree that only liability will be resolved by the Court at the scheduled September 24, 1986 hearing, and that if liability is determined in favor of Plaintiffs, the amount of damages will be heard at a later jury trial.

(e) List of witnesses who may be called at liability trial:

For Plaintiffs:

1. Bill Lambert
2. Joe Himrod
3. Joe B. Himrod
4. Stan Pelham
5. E. L. Civerola
6. Chan Hannon
7. Jim Griffith
8. Richard Gaskella and Dr. Sal Alfieri (Defendant's representatives as adverse witnesses)

For Defendant:

1. Dr. Calvin Schoulties

(f) List of exhibits to be used at liability trial:

For Plaintiffs:

1. Cassette film of canker and burnings in 1984.

2. Citrus Canker Action Plan for the State of Florida, November 1984, Revised 1985, Revised 1986.

3. Exhibits from Gaskalla deposition.

4. Materials produced and copied from Defendant's files pursuant to notice regarding exposed plants, inventory, and destroyed plants and specimen tests at Plaintiffs' Nurseries.

For Defendant:

1. All Exhibits to original complaint.

(g) Motions or other pending matters: None.

(h) Signature of counsel for each party appears below.
Dated this 29th day of August, 1986.

/s/ M. Stephen Turner
CULPEPPER, PELHAM, TURNER & MANNHEIMER
Post Office Drawer 11300
Tallahassee, FL 32302-3300
904/681-6810

/s/ Robert A. Chastain
ROBERT A. CHASTAIN
Florida Department of Agriculture
Room 515, Mayo Building
Tallahassee, FL 32301
904/488-6853

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, DEPARTMENT
OF AGRICULTURE AND CONSUMER
SERVICES,

Petitioner,

vs. CASE NO. 70-524

MID-FLORIDA GROWERS, INC. AND
HIMROD & HIMROD CITRUS NURSERY,
a partnership composed of
Joe Himrod and Joe B. Himrod,

Respondents.

RESPONDENT'S MOTION FOR ATTORNEYS' FEES

Respondents, Mid-Florida Growers, Inc. and Himrod & Himrod Citrus Nursery, pursuant to Rule 9.400, Florida Rules of Appellate Procedure, move the Court for an order awarding them attorneys' fees for services in these proceedings, and as grounds in support thereof says:

1. Under §73.131(2), Florida Statutes (1985), in a condemnation proceedings, the condemning authority is required to "pay all reasonable costs of the proceeding in the appellate court, including reasonable attorneys' fees to be assessed by that court, except upon an appeal taken by a

defendant in which that judgment of the trial court shall be affirmed."

2. Respondents have not initiated proceedings in this court, but have been obliged to protect the decisions below finding Petitioner obligated to pay just compensation for inversely condemning their property. Respondents are therefore entitled to attorneys' fees which should be granted to a property owner except when he unsuccessfully appeals.

3. The appellate court below granted Respondents' Motion for Attorneys' Fees as shown by the attached copy of the Order of April 10, 1987.

4. Suggestion is made to allow the trial court to determine reasonable attorneys' fees for services in this Court when fees and costs for trial and DCA proceedings are determined. See Boynton v. Canal Authority, 311 So.2d 412 (Fla. 1st DCA 1975); State Road Dept. of Florida v. Hancock, 250 So.2d 307 (Fla. 2nd DCA 1971).

/s/ M. Stephen Turner
M. Stephen Turner of
BROAD AND CASSEL
P. O. Drawer 11300
Tallahassee, FL 32302
904/681-6810
ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to FRANK G. GRAHAM, JR., Florida Department of Agriculture, Room 515, Mayo Building, Tallahassee, FL 32301, by U.S. Mail, this 29th day of June, 1987.

/s/ M. Stephen Turner
M. Stephen Turner

IN THE SECOND DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA

APRIL 10, 1987

STATE, DEPARTMENT OF
AGRICULTURE AND CONSUMER
SERVICES,

Appellant,

v. Case No. 86-2785

MID-FLORIDA GROWERS, INC.,
et al.,

Appellees.

The attorney for Appellees having filed a motion for attorneys fees in the above-styled appeal, upon consideration, it is,

Ordered that said motion is hereby granted in an amount to be set by the trial court.

A TRUE COPY
ATTEST:

CLERK, DISTRICT COURT OF APPEAL
SECOND DISTRICT

C:
M. Stephen Turner, Esq.
Harry L. Michaels, Esq.
Hon. Coleman W. Best

IN THE CIRCUIT COURT FOR THE TENTH JUDICIAL CIRCUIT
IN AND FOR HARDEE COUNTY, FLORIDA

MID-FLORIDA GROWERS, INC., and
HIMROD & HIMROD CITRUS NURSERY,
a Partnership composd of
Joe Himrod and Joe B. Himrod,

Plaintiffs,

vs. Case Number CA-G-85-275

STATE OF FLORIDA, DEPARTMENT
OF AGRICULTURE AND CONSUMER
SERVICES,

Defendant.

PRETRIAL ORDER

THIS CAUSE came on for pretrial hearing in Chambers on March 2, 1988. M. Stephen Turner, C. A. Boswell, Jr., Dabney L. Conner were present with their clients, William Lambert of Mid-Florida Growers, Inc., Joe Himrod and Joe Himrod, Jr., of Himrod and Himrod Citrus Nursery, Plaintiffs, Mygnon Evans, of counsel to Plaintiffs was also present. Harry Michaels was present for the Defendant, State of Florida, Department of Agriculture and Consumer Services. The Court having reviewed Plaintiffs' Unilateral Pretrial Submission on Damages and received the

argument of counsel and otherwise being advised of the premises, it is hereby ordered:

1. Defendant's ore tenus motion to stay trial proceedings pending possible review of the determination of liability of Defendant for damages on re-hearing in the Supreme Court of Florida or before the United States Supreme Court is hereby denied because this Court has not received notice of any stay of proceedings or recall of the mandate of the Second District Court of Appeal.

2. Defendant's ore tenus motion to continue the trial now set in this cause on March 22, 1988, for sixty (60) days is hereby denied.

3. Plaintiffs' Unilateral Pretrial Submission on Damages is adopted as the Pretrial Stipulation in this cause and is incorporated by this order because the Defendant has chosen not to participate in the preparation of a Pretrial Stipulation as required by the Court's order setting trial and pretrial conference.

4. Plaintiffs' pending Motions for Leave to Amend the Second Amended Complaint to seek additional compensation for loss of productivity of their business for a

temporary period and for additional unnecessary expenses and relocation costs is hereby granted. These claims are considered part of the matters that may be submitted for determination by the jury on the issue of Plaintiff's damages.

5. Defendant has undertaken to and shall be obligated to acquire the attendance of a court reporter at the trial proceedings.

6. The parties shall exchange all exhibits to be offered into evidence at trial within ten (10) days from the date of this order.

7. Counsel will meet with the Clerk at 8:30 a.m. on the morning of the trial to pre-mark exhibits.

8. The parties shall specify within ten (10) days of the pretrial conference all witnesses they intend to use at trial bearing in mind the Court's admonition against the use of cumulative testimony.

9. All discovery shall be concluded by the close of business on Friday, March 18, 1988. If any person is to appear by deposition, counsel intending to use such deposition(s) shall inform opposing counsel by the discovery cut off date.

10. Plaintiffs shall submit a complete set of proposed jury instructions five (5) days prior to trial. Defendant shall submit its proposed jury instructions on the morning of the day trial begins.

11. The Statement of the Case set forth below shall be read by the Court to the Jury. No other statement of the nature of the case may be made to the jury by either party.

STATEMENT OF THE CASE:

On October 7, 1984, the State of Florida, Department of Agriculture and Consumer Services, as a part of their canker eradication program, commenced burning 137,980 citrus nursery trees belonging to Plaintiff, Mid-Florida Growers, Inc. and 143,594 citrus nursery trees belonging to Himrod and Himrod Citrus Nursery. This destruction continued until October 17, 1988, when all of Plaintiffs' trees had been destroyed.

Based on competent substantial evidence previously heard in this matter it has already been determined that no citrus canker was present at these Plaintiffs' nurseries and

that their citrus nursery trees were healthy and not contaminated with canker.

The State of Florida, Department of Agriculture and Consumer Services is therefore obligated, as a matter of law, to pay full and just compensation to the Plaintiffs for their losses in accordance with the Constitution of the State of Florida. This determination of the Court has been affirmed by the Second District Court of Appeal of Florida and Supreme Court of Florida and may not be questioned in this proceeding.

Your duty will be to determine in this portion of the case, the losses sustained by these Plaintiffs as a result of the Department's actions. The only issue for your determination in this proceeding on damages will be to decide the value of the trees destroyed and the amount of other compensible losses associated with this taking by the Department pursuant to proper instructions given to you by the Court.

12. Plaintiffs and Defendant have agreed that a six person jury with one alternate will be empaneled and that each side shall have three peremptory challenges. Each side

shall have one peremptory challenge in the selection of the alternate juror.

13. The Plaintiffs shall present their cases first and shall be entitled to proceed first on opening statement and closing argument.

14. If the rule of sequestration is invoked at trial, the attorneys for each party shall be responsible for instructing and controlling their witnesses on the obligations of this rule.

DONE AND ORDERED in Chambers at Bartow, Polk County, Florida, this 8th day of March, 1988.

J. Tim Strickland
J. TIM STRICKLAND
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was forwarded by regular United States Mail this 8th day of March, 1988, to M. Stephen Turner, Esquire, Post Office Drawer 11300, Tallahassee, FL 32302; Harry Lewis Michaels, Esquire, Room 515 Mayo Building, Tallahassee, FL 32399-0800; and to Dabney L. Conner, Esquire, Post Office Box 1578, Bartow, FL 33830.

/s/ Polly Rogers
POLLY ROGERS
JUDICIAL ASSISTANT

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT, IN AND FOR HARDEE COUNTY, FLORIDA

MID-FLORIDA GROWERS, INC. and HIMROD & HIMROD CITRUS NURSERY, a Partnership composed of Joe Himrod and Joe B. Himrod,

Plaintiffs,

vs. Case No. CA-G-85-275

STATE OF FLORIDA, DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES,

Defendant.

FINAL JUDGMENT

Based on the jury verdict and the requirements of law, it is hereby ORDERED AND ADJUDGED that:

1. Defendant, STATE OF FLORIDA, DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES, is liable to and shall pay Plaintiff, MID-FLORIDA GROWERS, INC., the sum of Nine Hundred Sixty-six Thousand One Hundred Seventy-seven Dollars and ninety-five cents ($966,177.95), plus 12% interest per annum from date hereof, for which let execution issue.

2. Defendant, STATE OF FLORIDA, DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES, is liable to and shall pay Plaintiff HIMROD & HIMROD CITRUS NURSERY, the sum of Nine Hundred Seventy-seven Thousand Two Hundred Eighty-one Dollars ($977,281.00), plus 12% interest per annum from date hereof, for which let execution issue.

The Court reserves jurisdiction to award attorneys fees and costs of this case.

DONE AND ORDERED this 26th day of April 1988.

/s/J. Tim Strickland
J. Tim Strickland
Circuit Judge

Copies furnished to:
M. Stephen Turner
Dabney Conner
Harry Michaels
Mallory Horne